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SERVICE OF PROCESS THROUGH SOCIAL MEDIA IN MISSISSIPPI

*Anna Claire Henderson**

I. INTRODUCTION

"Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done."[1] Rather than being an extraordinary case, it is relatively common to have a case where the location of a defendant, nonresident or resident of the state, is unknown and service proves to be more difficult.[2] With the Supreme Court setting the standard for the constitutionality of notice in *Mullane v. Central Hanover Bank & Co.*,[3] courts have been given more freedom to accept newly-proposed methods of service that would meet the constitutional requirements,[4] provided that the method is accepted and proscribed by statute.[5] With advances in technology, internet, and 81% of the United States population being active on some form of a social media account,[6] it is evident that Americans are in a different era where service by "notice on a courthouse door or in a newspaper" by publication are no longer the most pragmatic means to notify a defendant who cannot be located to be served process.[7]

For example, in *Noble v. Noble*, the wife attempted to serve her husband in a divorce action through notice by "nonresident publication in

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1. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 319 (1950) (citing Blinn v. Nelson, 222 U.S. 1, 7 (1911)).

2. *See generally* Noble v. Noble, 502 So. 2d 317 (Miss. 1987).

3. *Mullane*, 339 U.S. at 314.

4. *See* Trisha Dowerah Baruah, *Effectiveness of Social Media as a tool of communication and its potential for technology enabled connections: A micro-level study,* 2 INT'L J. OF SCI. & RES. PUBL'NS 1, 8-9 (2012) (discussing the impact of social media on the way people communicate and process information).

5. *Noble*, 502 So. 2d at 319.

6. J. Clement, Social Media – Statistics & Facts, https://www.statista.com/topics/1164/social-networks/.

7. Peter S. Vogel & Sara Ann Brown, *U.S. Trial Courts Now Allow Service by Facebook and LinkedIn, but Will Appellate Courts Agree?*, Soc. Media L. & P. Rep. (BNA) 03 SMLR 33, at 789 (Nov. 4, 2014).

[a] newspaper."[8] Due to the defendant not being found after a diligent inquiry and "the post office address of the defendant [not being] known to the plaintiff after diligent inquiry," service of process by publication was a constitutionally permissible method of effecting service upon the defendant under Rule 4(c)(4)[9] of Mississippi Rules of Civil Procedure ("Miss. R. Civ. P.") to grant a divorce.[10] However, the Supreme Court of Mississippi held that service by publication was not an adequate form of notice for rendering a "monetary judgment" with the granted divorce.[11] The Court concluded that the adequacy of notice was questionable due to the absence of some form of proof of the defendant's receipt of the summons.[12] If social media service was allowed under Rule 4(c) as another alternative procedural means, then locating and proving the defendant's reception of the summons would become less taxing.

With advances in communication and technology, it seems that service through social media under the right circumstances could be "a more pragmatic means by which to serve a missing defendant" than notice by publication.[13] If Mississippi would adopt a provision giving courts the freedom to accept service through social media under certain circumstances, it would possibly help alleviate some of the conflicts that come with serving defendants who cannot be located or who are evading service.

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8. *Noble*, 502 So. 2d at 317.

9. Rule 4(c)(4) states:

> (A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

10. *Noble*, 502 So. 2d at 321.

11. *Id.* at 320.

12. *Id.*

13. Vogel & Brown, *supra* note 7, at 789.

This Article exposes a possible solution to the continuing problem of serving defendants who are missing or evading service in Mississippi. For a new method of service to be introduced, it has to meet the notice requirements set out in the Fourteenth Amendment Due Process Clause and be authorized by the Mississippi Rules of Civil Procedure Rule 4. This Article proposes an amendment to Rule 4 of the Mississippi Rules of Civil Procedure that would give courts the power to allow alternative forms of service, such as service via social media under certain circumstances. In addition, this Article outlines the requirements that social media service must meet to successfully be considered constitutionally sufficient. This Article is not proposing that service of process through social media replace all preexisting methods; rather, this Article is simply introducing an alternative method to choose from that would be more likely to provide defendants with notice under certain circumstances.

II. THE HISTORY OF SERVICE OF PROCESS IN THE UNITED STATES

Under the Fourteenth Amendment, "a person shall not be deprived of life, liberty, or property without due process of law."[14] A cause of action is a form of property that is protected by the Due Process Clause of the Constitution because one has a property interest in the lawsuit.[15] Under the Due Process Clause, if a court intends to interfere with a person's life, liberty, or property, a defendant must be given "the opportunity to present his case and have its merits fairly judged, and therefore some form of hearing is required before the owner is finally deprived of a protected property interest."[16]

In order for a defendant's due process right to be protected, "due process requires notice reasonably calculated, under all circumstance, to appraise interested parties of the pendency of the action."[17] The purpose of notice is to make a defendant aware of a pending action, so they have the opportunity to be heard. Service of process is used to accomplish this notice. The method used to notify a defendant of a lawsuit must always be constitutional and comply with the applicable state or federal service rules of that jurisdiction.[18]

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14. U.S. CONST. amend. XIV, § 1.

15. Albert v. Allied Glove Corp., 944 So. 2d 1, 6 (Miss. 2006) (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982)).

16. *Id.* (citing U.S. CONST. amend. XIV, § 1).

17. Miss. Bd. of Veterinary Med. v. Geotes, 770 So. 2d 940, 943 (Miss. 2000).

18. Alyssa L. Eisenberg, Comment, *Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants*, 51 San Diego L. Rev. 779, 782 (2014).

The sections that follow explore what the standard is for determining the constitutionality of different methods of services, as well as how this standard developed. The sections will also address the possible methods of service of process that meet this constitutional standard, and that can be used to provide this important constitutional right of notice. In addition, the sections will also explore how these methods have evolved over the years due to progress in travel, communications, and technological advances. Further, the following sections will explore the evolution of service of process through social media being used abroad[19] and now in certain parts of the United States.[20]

A. Basic Purpose for Service of Process

The opportunity to be heard is the fundamental requisite for due process of law that gives rise to the requirement of notice because the right to be heard is worthless unless one is aware that an action is pending,[21] as well as a need for one to protect their rights to life, liberty, and property.[22] The basic purpose of service of process is to formally assert the court's authority over the defendant, as well as inform them of the pending cause of action so that he or she can prepare to defend it.[23] For a court to enter a binding judgment against a defendant, the defendant must be given sufficient notice of the court's intentions to interfere with his liberty or property.[24] Service of process is delivering the initial papers in the action to the defendant to provide sufficient notice of a pending action, so the defendant has the right to decide whether to appear, default, acquiesce, or contest.[25]

For notice to be considered sufficient, the method of service should be authorized by statutory provisions of that jurisdiction and must

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19. *See generally* St. Francis Assisi v. Kuwait Fin. House, No. 3:16-cv-3240-LB, 2016 U.S. Dist. LEXIS 136152 (N.D. Cal. Sep. 30, 2016). Al-Ajmi was a Kuwaiti national and efforts to locate him were unsuccessful. St. Francis asked to serve al-Ajmi by alternative means under Federal Rule of Civil Procedure 4(f)(3) via the social-media platform, Twitter.

20. *See generally* Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709 (Sup. Ct. 2015) (Plaintiff wife was permitted to serve defendant husband a divorce summons by sending a private message through defendant's social media account.).

21. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

22. U.S. CONST. amend. XIV, § 1.

23. JOSEPH W. GLANNON ET AL, CIVIL PROCEDURE: A COURSEBOOK (3d ed. 2017).

24. GLANNON ET AL, *supra* note 23, at 328; Pennoyer v. Neff, 95 U.S. 714, 732-33 (1877).

25. GLANNON ET AL, *supra* note 23, at 328; *Pennoyer*, 95 U.S. at 732-33.

be constitutional under the Fourteenth Amendment Due Process Clause.[26] If the method of service of process is not proper due to being unconstitutional or failing to comply with the rules of that jurisdiction, then the court can dismiss the action or reverse the default judgment.[27] Each state is allowed to determine what manners of service of process are sufficient to assert that court's authority over a defendant, but all methods of service must comply with the requirements set out in the Due Process Clause of the Fourteenth Amendment to the Constitution.[28] For these methods of service of process permitted by states to comply with this due process law,[29] they have to, at a minimum, meet the following requirements: (1) notice and (2) opportunity for hearing appropriate for the nature of the case.[30]

B. The Determination of a Method's Constitutionality

In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court expanded the basic constitutional standard for proper notice under the Fourteenth Amendment, which became known as the "Mullane Standard."[31] This case developed the determination of sufficient service of process to be through notice that was "reasonably calculated to inform" based on the circumstance of the individual case.[32] For notice to be sufficient under the Constitution, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," as well as afford the interested parties a reasonable amount of time to make their appearance.[33] Even though "personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding,"[34] it is not always required under the circumstances of certain cases.[35] Actual notice is not constitutionally required,[36] so constructive

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26 *Mullane*, 339 U.S. at 311.

27 Rentz v. Swift Transp. Co., 185 F.R.D. 693, 697 (M.D. Ga. 1998).

28 Marjorie A. Shields, Annotation, *Service of Process Via Computer or Fax*, 30 A.L.R.6th 413 (2008).

29 GLANNON ET AL, *supra* note 23, at 333.

30 *Mullane*, 339 U.S. at 313.

31 Arthur F. Greenbaum, *The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Green v. Lindsey*, 33 Am. U.L. Rev. 601 (1984).

32 *Mullane*, 339 U.S. at 313.

33 *Id.* at 314 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

34 *Id.* at 313.

35 *Id.* at 319.

36 Dusenbery v. United States, 534 U.S. 161, 169-170 (2002).

forms of notice, also referred to as substitute service, are allowed as long as these methods are constitutional under the Mullane Standard.[37]

In *Mullane*, even though notice by publication in a newspaper to beneficiaries of a trust was considered a sufficient statutory notice, it was not considered the most practicable notice for beneficiaries whose names and addresses were available.[38] In this case, it was argued that statutory notice by newspaper publication was sufficient for beneficiaries whose "whereabouts could not with due diligence be ascertained."[39] But, "the statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means."[40] It was inadequate because it was not the most appropriate or "reasonably calculated" method of service to inform the interested parties who "were known present beneficiaries of known place of residence."[41]

Reasonableness is the key to the constitutional validity of notice. Therefore, it is not a "mere gesture," but the actual "means employed must be such as one desirous of actually informing the absentee" that is necessary.[42] Any statutory method of notice will be able to claim constitutional validity if the method chosen is reasonably certain to inform interested parties, and the form chosen is not substantially less likely to provide notice than other feasible and customary substitutes."[43] With the names and postal addresses of the beneficiaries being accessible, notice by newspaper publication was less likely than postal notification to appraise the beneficiaries of the pendency of the action.[44]

Thus, it is clear that when it is reasonably possible or practicable to use a substitute method which would give more adequate warning to interested parties than another, then one must always choose the method that would appear truly desirous to inform the interested parties.[45] In cases where defendants are missing or unknown, however, "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree

37 *Mullane*, 339 U.S. at 314-15.
38. *Id.* at 318-19.
39. *Id.* at 317.
40. *Id.* at 319.
41. *Id.* at 313.
42. *Id.* at 315 (citing Hess v. Pawloski, 274 U.S. 352 (1927)).
43. *Id.* (citing Wuchter v. Pizzutti, 276 U.S. 13 (1928)).
44. *Id.* at 318.
45. *Id.* at 317.

foreclosing their rights."[46] The court has to look at the circumstances of the case to determine whether the interested parties could have been easily informed by another means of service, and if so, then the method chosen will likely be determined inadequate or insufficient to satisfy the due process of law.[47]

C. Service of Process in Mississippi and Federal Courts

Service of process for the purpose of this article refers to the delivery of both the summons and a copy of the complaint together to the interested party by someone that is at least eighteen and is not a party to the action, which both Mississippi Rule 4 and Federal Rule 4 require.[48] The plaintiff is free to request the court to order the service of the initial papers of the lawsuit to be delivered by a U.S. Marshal or another specially appointed person.[49] In federal court, plaintiffs have to serve defendants within 90 days of the filed complaint, whereas plaintiffs have 120 days to serve in Mississippi state courts.[50] This is an example of how, even though methods and procedures of services may vary to some extent across jurisdictions, there are a set of traditional and basic methods that are shared by Mississippi and federal courts, as well as other jurisdictions.

When a defendant cannot be located to the extent that it would hinder the preferred in-hand service process or burden the plaintiff, the court has alternative methods of service in place for the particular situation to give defendants constructive notice, which is referred to as "substitute service."[51] A variety of methods for substitute service of process are described below that are authorized by certain jurisdictions that "may be sufficient to inform parties of the object of proceedings."[52] Forms of substitute service vary throughout different jurisdictions, but they all have the same goal and purpose of giving the defendant a reasonable opportunity to have notice of the proceedings.[53] Now that it has been established what is to be delivered and who is to deliver the summons and complaint, we will now discuss the different methods of serving the papers to interested parties. The following sections will

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46. *Id.* (citing Cunnius v. Reading Sch. Dist., 198 U.S. 458 (1905); Blinn v. Nelson, 222 U.S. 1 (1911)); *See* Jacob v. Roberts, 223 U.S. 261 (1912)).

47. *Mullane*, 339 U.S. at 318-19.

48. FED. R. CIV. P. 4(c); MISS. R. CIV. P. 4(c)(1).

49. FED. R. CIV. P. 4(c)(3).

50. FED. R. CIV. P. 4(m); MISS. R. CIV. P. 4(h).

51. *Substitute Service*, BLACK'S LAW DICTIONARY (8th ed. 2004).

52. Pennoyer v. Neff, 95 U.S. 714, 728 (1877).

53. Gerald N. Hill and Kathleen T. Hill, *The Free Dictionary*, FARLEX, https://legal-dictionary.thefreedictionary.com/Service+of+Process (2005).

address and compare some of these more traditional methods and also discuss other evolving methods that Mississippi should adopt, such as social media service.

D. Service of Process Through Social Media was First Introduced Internationally

Neither Federal Rules of Civil Procedure Rule 4 or Mississippi Rules of Civil Procedure Rule 4 explicitly allow service of process through social media, but it has been authorized under Rule 4(f) in federal court and flexible notice provisions in other states. Rule 4(f) is the rule for serving an individual in a foreign country.[54] The foreign individual that is to be served must be a competent person that is not a minor.[55] The foreign defendant must be served in one of the following manners: 1) "by an internationally agreed means of service" authorized by the Hague Convention, 2) "if there is no internationally agreed means," then by service authorized by the foreign country's law, service directed by the foreign country's court upon request, personal service, or service by certified mail, or 3) service by other means that are ordered by the court that are not prohibited by an international agreement.[56]

The method of service of process via social media, such as "modes of electronic and online communications including email and social networking sites like Facebook," was first introduced under Rule 4(f)(3).[57] In federal court, Rule 4(f)(3) is the rule that governs service of process of an individual in a foreign country that allows a method that is reasonably calculated to give notice "by other means not prohibited by international agreement, as the court orders," leaving the proposed method of service up to the court to authorize as proper and constitutional.[58] This rule gives rise to a catch-all provision that allows courts to authorize any means of service as long as it complies with due process.[59]

The due process reasonableness inquiry standard set out in *Mullane*[60] **"**unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[61]

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54. FED. R. CIV. P. 4(f)(3).

55. FED. R. CIV. P. 4(f).

56. *Id.*

57. WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 U.S. Dist. LEXIS 22084, at *7 (E.D. Va. Feb. 20, 2014).

58. FED. R. CIV. P. 4(f)(3).

59. St. Francis Assisi v. Kuwait Fin. House, No. 3:16-cv-3240-LB, 2016 U.S. Dist. LEXIS 136152 (N.D. Cal. Sep. 30, 2016).

60. *Mullane*, 339 U.S. at 313.

61. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).

Courts can order any means of service under this rule as long as the method is reasonably calculated to give the defendant actual notice of the proceedings and must not be prohibited by international agreement.[62] The international agreement does not have to explicitly authorize the proposed method of service; it just cannot prohibit it.[63] The international agreement can simply be silent to the issue, which would allow courts to exercise their unfettered authority to choose an alternative mode of service, such as service by telex message,[64] to be proper under the circumstances, like seen in *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co*.[65] Service via social media is not a "last resort nor extraordinary relief"[66] method of service; it is merely one method of many that is used to serve process on an international defendant.[67] A plaintiff is not required to attempt service through all other available means of service offered under Rule 4(f) provision before resorting to requesting social media service.[68] The plaintiff simply has to show that social media service is reasonably calculated to reach the defendant under the circumstances of the case.

Under Rule 4(f)(3), the court is allowed to tailor the method of service employed on an international defendant based on the specific circumstances of the case.[69] For example, in *FTC v. PCCare Inc.*, the plaintiff was proposing to serve the defendants that were located in India via email and Facebook for unpaid attorney fees.[70] Even though some courts may require a show of attempted service through the other possible methods, "Rule 4(f)(3) may allow the district court to order a special method of service, even if other methods remain incomplete or

62. *WhosHere, Inc.*, 2014 U.S. Dist. LEXIS 22084, at *7.

63. New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80 (S.D.N.Y. 1980).

64. The telex is an older "system of communication in which messages are sent over long distances by using a telephone system and are printed by using a special machine (called a teletypewriter)." *Telex*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2015).

65. *New England Merchs. Nat'l Bank*, 495 F. Supp. at 81.

66. *Rio Props.*, 284 F.3d at 1016.

67. *Id.* at 1015.

68. FTC v. PCCare247 Inc., No. 12 Civ. 7189 (PAE), 2013 WL 841037, at *8 (S.D.N.Y. Mar. 7, 2013); *Rio Props.*, 284 F.3d at 1014-15 ("No such requirement is found in the Rule's text, implied by its structure, or even hinted at in the advisory committee notes," "that Rule 4(f) should be read to create a hierarchy of preferred methods of service of process.").

69. WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 U.S. Dist. LEXIS 22084, at *7 (E.D. Va. Feb. 20, 2014) (citing SEC v. Anticevtic, 2009 U.S. Dist. LEXIS 11480, at *3 (S.D.N.Y. Feb. 8, 2009)).

70. *PCCare247 Inc.*, 2013 WL 841037, at *5.

unattempted."[71] The Federal Trade Commission ("FTC") proposed service by email, social networking site (Facebook), and publication, which publication was set as a last resort due to cost.[72] The court found that service via email and Facebook as a "backstop" did not violate any international agreement, nor did they violate due process.[73]

In *PCCare Inc.*, service by email alone was held to comply with "due process [if] a plaintiff demonstrates that the email is likely to reach the [foreign] defendant."[74] The plaintiff demonstrated the authenticity of the email by establishing that the email accounts it had for the foreign defendants had been an effective means of communicating with the defendants, which was the case here because it was an internet-based business that communicated through email.[75] However, Facebook was not able to stand alone as the sole method of service, but rather a reinforcement to service via email.[76]

In *PCCare Inc.*, the court held that, for service by Facebook to be the "only" means of service, there has to be substantial evidence "that would give the [c]ourt a degree of certainty that the Facebook profile . . . is in fact maintained by [the defendant] or that the email address listed on the Facebook profile is operational and accessed by [the defendant]."[77] Even though the FTC set forth enough facts to prove that it was likely the Facebook accounts were actually operated by the foreign defendants because the email addresses for the Facebook accounts matched the email addresses given to the plaintiff, and the Facebook accounts "list[ed] their job titles at the defendant companies as their professional activities," the court did not feel that Facebook alone was enough to be adequate notice.[78] Due to the specific circumstances of this case, it was found to be a constitutional method of service because it was highly likely to reach the defendants by service of email and Facebook combined.[79] If "defendants run an online business, communicate with customers via email, and advertise their business on their Facebook pages," it complies with due process of law to serve the defendant by those same means.[80]

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71. *Rio Props.*, 284 F.3d at 1015.

72. *PCCare247 Inc.*, 2013 WL 841037, at *3.

73. *Id.* at *5.

74. *Id.* at *4.

75. *Id.* at *4-5 (citing Williams-Sonoma Inc. v. Friendfinder Inc., No. C 06-06572 JSW, 2007 U.S. Dist. LEXIS 31299, 2007 WL 1140639, at 2 (N.D. Cal. Apr. 17, 2007)).

76. *Id.* at *5.

77. *Id.* (citing Fortunato v. Chase Bank USA, No. 11 Civ. 6608 (JFK), 2012 U.S. Dist. LEXIS 80594, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012)).

78. *Id.*

79. *Id.* at *6.

80. *Id.*; Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).

The courts were wading into the new uncharted waters of social media service, but they were cautious by finding these methods constitutional only when exercised as a backstop or "collectively."[81] Like seen in *WhosHere, Inc. v. Orun*, the court found that "four means of service [collectively], two email and two social networking accounts ostensibly belonging to defendant, comport[ed] with due process."[82] This proves that courts knew that this new area of service was the most reasonable way to reach the foreign defendant, but their uncertainty of reaching the desired defendant with this particular method of service made courts ask for more than what was required of other traditional methods.

For example, in a bankruptcy case in Georgia, social media service significantly helped a trustee having difficulty serving a foreign defendant that was moving from country to country.[83] In *Broadfoot v. Diaz,* the foreign defendant was evading service by moving around and refusing to give the trustee any useful contact information.[84] The only forms of communication the foreign defendant provided the trustee with was a "facsimile number and [an] electronic mail address, [which] indicated his preference for such methods of communication."[85] With the help of Rule 4(f)(3) that gives courts the flexibility to authorize special means of service in particularly difficult cases, it was found constitutional to allow service via electronic email and fax, in addition to service by mail to the defendant's last known address, because that was proven to be the foreign defendant's preferred means of communication.[86] This is an example of courts protecting themselves from the fear of breaching a defendant's due process rights through authorized progressive means of service, such as email and fax, by allowing them collectively with a more traditional means of service. However, over time, courts have developed the principle that "[I]f any methods of communication can be reasonably calculated to provide a [foreign] defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them."[87]

Even though courts were being cautious by requiring more when serving foreign defendants via social media to ensure constitutionality, situations eventually arose where social media service alone was enough

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81. WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 U.S. Dist. LEXIS 22084, at *11 (E.D. Va. Feb. 20, 2014).

82. *Id.* at *11-12.

83. Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs.), 245 B.R. 713 (Bankr. N.D. Ga. 2000).

84. *Id.* at 718.

85. *Id.*

86. *Id.* at 720.

87. *Id.* at 721.

because it was the only available means. For example, in *St. Francis Assisi v. Kuwait Fin. House*, the plaintiff sued the defendant for relief and damages that were a result of the defendant's financing a terrorist organization.[88] The plaintiff struggled to locate and serve the international defendant, so the plaintiff requested the court to authorize service of process through the defendant's Twitter account that had been used "to fundraise large sums of money for terrorist organizations."[89] Because of the defendant's active use of the Twitter account to communicate with other individuals, the court found this method alone to be proper because under these specific circumstances "service by the social-media platform, Twitter, was reasonably calculated to give notice" and was the "method of service most likely to reach" the defendant.[90]

Similarly, in *Rio Props., Inc. v. Rio Int'l Interlink*, the court authorized service via email under Rule 4(f)(3) because the foreign defendant, an internet business entity, had "designated its e-mail address as its preferred contact information."[91] Unlike *New England Merchs. Nat'l Bank*, the foreign defendant in *Rio Props., Inc*. was an internet business entity that had neither an office nor a door- just a computer terminal.[92] The court found that if any method of communication was to be reasonably calculated to provide the foreign defendant with notice, then it must have been email, considering it was the method of communication the defendant utilized and preferred.[93] With the defendant's business being structured so that email was the *only* way to contact the defendant, the court was forced to adapt to the circumstances of the case and allow sole service via email to be constitutional.[94] These are proper circumstances for the court to broaden the methods allowed under the constitutional principle and progress into the technological renaissance.[95]

Different jurisdictions have authorized different methods of electronic and online service of process pursuant to Rule 4(f)(3) because each court had to decide based on the circumstance of the case which method would most likely reach the defendant with notice, such as what particular form of social media was used by the defendant.[96] Even though

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88. St. Francis Assisi v. Kuwait Fin. House, No. 3:16-cv-3240-LB, 2016 U.S. Dist. LEXIS 136152 (N.D. Cal. Sep. 30, 2016).

89. *Id.*

90. *Id.* at 5.

91. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).

92. *Id.* at 1018.

93. *Id.*

94. *Id.*

95. *See Rio Props.*, 284 F.3d 1007.

96. *See, e.g.*, FTC v. PCCare247 Inc., 2013 U.S. Dist. LEXIS 31969, 2013 WL 841037, at *3-4 (S.D.N.Y Mar. 7, 2013) (permitting service by email and Facebook); *In*

service of process through social media started internationally, this method of service has progressed to be used not only on foreign defendants but also on domestic defendants under certain circumstances in jurisdictions that have evolved with advances in technology.

E. Service of Process Through Social Media in the United States

Over the past decade, social media has become a prominent part of many people's lives to the extent that some jurisdictions are permitting service through social media as an alternative form of service on non-foreign defendants.[97] There is no provision authorizing social media service on domestic individuals under Rule 4 of the Federal Rules of Civil Procedure; however, it has been allowed by federal courts relying on state law under Rule 4(e).[98] Federal courts have found a loophole to not only serve defendants by social media service on foreign defendants under Rule 4(f)(3) but also on domestic defendants by relying on service rules of a state under Rule 4(e)(1).[99]

Fed. R. Civ. P. Rule 4(e) is the rule for "serving an individual within a judicial district of the United States," which allows service by (1) following state service rules of the state where the federal lawsuit is pending or where the defendant is served, (2) personal service, (3) dwelling and usual place of abode service, or (4) delivering service to an authorized agent.[100] Under Rule 4(e)(1), the federal courts are further *unshackled* from being limited to the traditional methods of service of process. More specifically, Rule 4(e)(1) allows an individual that is competent and not a minor to be "served in a judicial district of the United States by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district is located or where service is made."[101] This rule gives federal courts a window to authorize social media service when a state's service rules permit it through a broad notice provision.

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re Int'l Telemedia Associates, Inc., 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000) (authorizing service on defendant by fax and email address); *Rio Properties, Inc*., 284 F.3d at 1016 (permitting service by email); Chanel, Inc. v. acheterchanel.com, 2012 U.S. Dist. LEXIS 115518, 2012 WL 3544844 (S.D. Fla. Aug. 16, 2012) (authorizing service of process by email).

97. Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709 (Sup. Ct. 2015).

98. Fortunato v. Chase Bank USA, No. 11 Civ. 6608 (JFK), 2012 U.S. Dist. LEXIS 80594, 2012 WL 2086950 (S.D.N.Y. June 7, 2012).

99. FED. R. CIV. P. 4.

100. FED. R. CIV. P. 4(e).

101. *Id.*

For example, in *Fortunato v. Chase Bank USA*, the case was filed in federal court in the Southern District of New York, which pursuant to Rule 4(e), permitted the court to look to the service of process laws of N.Y. C.P.L.R. 308.[102] Due to the domestic third-party defendant evading service, the third-party plaintiff, Chase Bank, requested the court to allow an alternative form of service via email and Facebook.[103] Under N.Y. C.P.L.R. 308, service can be made by (1) personal service, (2) delivery to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and mail, (3) service on an agent, or (4) so-called "nail and mail" service.[104] However, New York has a unique notice provision that allows service to be made "in such manner as the court, upon motion without notice, directs" when the more traditional methods are impracticable.[105] Unlike Fed. R. Civ. P. Rule 4(f), this special New York provision "requires a showing of impracticability of other means of service" under the circumstances of the case.[106]

In *Fortunato*, the facts of the case proved that all other means of service were impracticable because the domestic defendant was evading service. However, the court did not allow service via email or Facebook because the plaintiff had "not set forth any facts that would give the [c]ourt a degree of certainty" that the Facebook account or the email address listed on the Facebook account was operated and accessed by the domestic defendant.[107] The court then settled to authorize the only alternative method remaining, which was service by publication in the area that the domestic defendant claimed to live on the Facebook account.[108] Social media service was allowed in this jurisdiction, but for this particular case, it was not found constitutional because the plaintiff did not set forth enough facts to prove the domestic defendant controlled the email address or Facebook account.[109] This is not always the case.[110]

In *Ferrarese v. Shaw*, the United States District Court for the Eastern District of New York authorized service via email and Facebook as supplement means under Rule 4(e)(1) of the Federal Rules of Civil Procedure and McKinney's CPLR ("CPLR") Section 308(5) in New

102. *Fortunato*, 2012 U.S. Dist. LEXIS 80594, at *3.
103. *Id.*
104. N.Y. C.P.L.R. 308(5) (McKinney 2016).
105. *Id.*
106. *Id.*
107. *Fortunato*, 2012 U.S. Dist. LEXIS 80594, at *7.
108. *Id.*
109. *Id.*
110. *See* Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709 (Sup. Ct. 2015).

York.[111] The plaintiff showed the other traditional means of service to be impracticable through numerous failed attempts to serve the defendant at her home address with a process server.[112] The plaintiff even hired a private investigator to locate the defendant, but these efforts still failed due to the defendant continuously changing her name to evade service. Because the other means were impracticable and the defendant was evading service, the court authorized service via email and Facebook.[113] But the court held that the plaintiff did not put forth enough facts to prove the defendant actually controlled the email address and Facebook account, so the court allowed these alternative methods as "supplemental means"[114] to the valid method of service by certified mail with return receipt to the defendant's last known address.[115] Courts want to allow social media service, but they have not adapted to the advances in technology enough to let the progressive method of service stand-alone unless the particular situation of the case leaves the court no choice.

The federal courts have not been "blind to changes and advances in technology."[116] The federal courts have adapted and evolved to accept social media service under circumstances that call for it. Under the Federal Rules of Civil Procedure, there is no specific provision that authorizes social media service, but there are provisions that indirectly allow it on foreign and domestic defendants. Federal courts can only authorize social media service on domestic defendants because some state laws have evolved to contain a catch-all provision that indirectly allows the courts to authorize it. Other states are keeping with the times and taking advantage of the advancements in communication through technology, particularly New York.

In New York, the provision of the statute that allowed the court to authorize social media service was CPLR 308 (5), which permitted personal service upon a natural person be made "in such manner as the court … directs" if service is impracticable by in-hand personal service, service by dwelling or usual place of abode, and nail and mail service authorized by the statute.[117] This provision gives the court the power to look at the specific circumstances of the case in question and decide

111. Ferrarese v. Shaw, 164 F. Supp. 3d 361, 364 (E.D.N.Y. 2016).

112. *Id.*

113. *Id.*

114. *Baidoo*, 5 N.Y.S.3d at 715.

115. *Ferrarese*, 164 F. Supp. 3d at 364, 368.

116. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002); *Baidoo*, 5 N.Y.S.3d at 711.

117. N.Y. C.P.L.R. 308(5) (McKinney 2016).

whether service via email, Twitter, Facebook, fax, etc., would be much more likely to reach the defendant than service by publication.[118]

For example, in *Baidoo v. Blood-Dzraku*, the plaintiff wife wanted to serve her husband divorce papers through Facebook direct message because she did not know the contact information nor the whereabouts of the defendant to serve him properly through any other method of service.[119] This is one of those cases that leaves the court no choice but to allow social media service, unaccompanied by traditional means, to be a valid method of service because no other means is possible. The plaintiff easily demonstrated the alternative means to be impracticable because all three forms of service require knowledge of the defendant whereabouts.[120] The defendant refused to make himself available for service as well as failed to provide a fixed address or place of employment.[121] Once the plaintiff demonstrated that the other alternative means were impracticable, the plaintiff had to set forth evidence that the defendant was the Facebook account holder to satisfy constitutional principles.[122]

To silence the central concern of whether the method by which the plaintiff seeks to serve a defendant comports with the fundamentals of due process by being reasonably calculated to provide the defendant with notice of the divorce, the plaintiff was required to submit a supplemental affidavit to prove the Facebook account belonged to the defendant.[123] The court found the copies of communication exchanged between the plaintiff and defendant over Facebook messages, along with verification of the defendant's photos, to be enough to persuade the court that the account belonged to the defendant.[124] After meeting the burden of demonstrating that it would be impracticable to serve the defendant by any of the other more traditional means of service and that service by Facebook was constitutional, the court "ventured into uncharted waters" and authorized service via Facebook direct message alone.[125]

Similarly, in *Hollow v. Hollow*, the plaintiff wife was attempting to serve her husband, who had moved to Saudi Arabia via email pursuant to the same expansive notice provision offered in the New York CPLR 308(5).[126] A defendant moving to a foreign country does not "relieve a

118. Hollow v. Hollow, 747 N.Y.S.2d 704, 706 (Sup. Ct. 2002) (citing Dime Sav. Bank of N.Y. v. Mancini, 169 A.D.2d 964 (N.Y. App. Div. 1991)).

119. *Baidoo*, 5 N.Y.S.3d at 712.

120. *Id.* at 712.

121. *Id.*

122. *Id.* at 714.

123. *Id.* at 715.

124. *Id.*

125. *Id.* at 712-13.

126. Hollow v. Hollow, 747 N.Y.S.2d 704, 705 (Sup. Ct. 2002).

plaintiff of her obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief" under N.Y. CPLR 308(5).[127] The plaintiff made reasonable efforts to effectuate service both through Interserve, which is an international process server, and through the defendant's employer.[128] With the other alternative methods proving to be impracticable, the plaintiff proposed service via e-mail considering this was the only form of communication the defendant used to communicate with the plaintiff and his children.[129]

Because the "Constitution does not require any particular means of service of process,"[130] e-mail in this particular case complied with due process because it was reasonably calculated to provide notice since e-mail was the defendant's preferred method of communication. To settle the court's concerns about the difficulty of verifying the defendant's receipt of the e-mail, it authorized service via e-mail, along with service by international registered air mail and international mail standard, to satisfy the due process requirements.[131] Courts are not replacing any traditional methods of service with social media service; courts are simply adding this progressive method to increase the likelihood of reaching defendants in difficult cases.

Parallel to the catch-all provision provided in the New York statute, New Jersey has a similar provision, N.J. Court Rules, R. 4:4-4(b)(3), that authorizes social media service.[132] This New Jersey service rule states, "[A]s a tertiary and last resort, if service cannot be made by any of the modes provided by R. 4:4-4, any defendant may be served as provided by court order, consistent with due process of law."[133] In *K.A. v. J.L.*, the plaintiff requested to serve the defendant via Facebook messenger under this New Jersey service rule.[134] The defendant initially contacted the plaintiff through Facebook and the plaintiff's adopted son through Instagram.[135] Because the diligent efforts to serve the defendant with injunction were exhausted through unsuccessful personal service and publication, the court found social media service by Facebook account to

127. *Id.* at 706.
128. *Id.* at 707.
129. *Id.* at 705.
130. *Id.* at 707 (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)).
131. *Id.* at 708 (citing *Mullane*, 339 U.S. at 314).
132. N.J. Ct. R. 4:4-4(b)(3).
133. K.A. v. J.L., 161 A.3d 154, 157 (N.J. Super. Ct. 2016) (citing N.J. Ct. R. 4:4-4(b)(3)).
134. *Id.* at 156.
135. *Id.*

be sufficient notice.[136] The court did not require as much evidence proving the authenticity of the Facebook account because it was the exact account the defendant employed to contact the adopted son and gave rise to the action for an injunction.[137] In difficult cases where contact with the defendant is minimal or primarily through social media, courts need to have the freedom to authorize service that would more than likely reach the defendant to give the plaintiff relief through constitutional means.

F. Methods of Service of Process Used in Mississippi Under Rule 4

Now that social media service has been shown to be constitutional under certain circumstances, this Article proposes that Mississippi Rules of Civil Procedure Rule 4 should be amended to include a provision that would authorize it. Similar to the McKinney's CPLR 308(5) provision, the proposed amendment will be a catch-all provision that allows plaintiffs to request a method of service, such as social media service, when the more traditional methods are impracticable. If Mississippi amends Rule 4, this would help ease the difficulty of serving defendants who cannot not be located or who are evading service by the traditional means offered under Rule 4.

The statutory provisions of Mississippi authorize many of the same traditional methods of service that have been discussed for individual defendants.[138] Mississippi courts authorize the following methods of service of process: (1) in-hand service of process by a process server or sheriff, (2) service at dwelling or usual place of abode, (3) service by first-class mail, (4) service by publication, and (5) service by certified mail on persons outside the state.[139] The proposed amendment would only allow plaintiffs to request social media service when in-hand service, service at dwelling, and service by first-class or certified mail were attempted or found to be impracticable. The circumstances of each case dictate what method of service is practicable. The following sections will address and compare the traditional methods of service offered under Mississippi Rules of Civil Procedure Rule 4 that would have to be proven impracticable before the proposed catch-all provision would take effect.

136. *Id.* at 159.
137. *Id.*
138. MISS. R. CIV. P. 4.
139. *Id.*

1. In-Hand Service

In-hand service within a jurisdiction is the "gold standard" method of service of process because it is the form of notice that is adequate in all types of proceedings, which has always been considered constitutional.[140] In-hand service, also known as personal service, is considered actual notice because someone *actually* hands over written notice of the lawsuit to the defendant in person.[141] Mississippi courts allow "delivering a copy of the summons and of the complaint to the individual personally or to an agent authorized by appointment of by law to receive service of process."[142] This method of service is the optimal way to deliver a complaint because it is direct and less disputable that service of process occurred.[143] But, this method of service is not always the easiest to execute because it requires that the plaintiff filing suit to have knowledge of the defendant's whereabouts.[144] Even though in-hand service is preferable, it is not required.[145]

In Mississippi courts, delivery of copies of the summons and complaint must be made by a process server or the sheriff of the county in which the defendant resides.[146] The process server can be any person that is 18 years or older and who is not a party in the lawsuit.[147] For a service to be made by a sheriff, the party seeking service has to make a written request to the court to appoint a sheriff to serve the individual personally.[148] The language of Mississippi's Rule 4 requires that personal service cannot be made with reasonable diligence before moving on to another method such as abode or dwelling service.[149] Therefore, a plaintiff has to show that reasonable efforts were made to serve the defendant via personal service before resorting to service on a relative at the dwelling place.[150] If reasonable diligence is proven in the failed attempt to serve an individual personally, then the process server or server appointed by the

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140. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950); Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 711 (Sup. Ct. 2015).

141. Jean Murray, *Constructive and Actual Notice in Civil Lawsuit Differences*, THE BALANCE SMALL BUSINESS (May 8, 2019), https://www.thebalancesmb.com/constructive-notice-and-actual-notice-in-civil-lawsuits-398193.

142. MISS. R. CIV. P. 4(d)(1)(A).

143. Murray, *supra* note 142.

144. GLANNON ET AL, *supra* note at 351.

145. *In-hand Service,* BLACK'S LAW DICTIONARY (8th ed. 2004).

146. MISS. R. CIV. P. 4(c).

147. *Id.*

148. *Id.*

149. MISS. R. CIV. P. 4(d)(1)(B).

150. MISS. R. CIV. P. 4(d)(1)(A).

court can move on to the next substitute method of service if circumstances warrant it, such as dwelling and abode service.

2. Dwelling or Usual Place of Abode

In the event the address of the party the plaintiff desires to notify is unknown, one form of traditional substitute service of process that is acceptable in Mississippi is "leaving a copy of the complaint and summons at the individual's dwelling or usual place of abode" in the hands of someone that is of "suitable age and discretion who resides there."[151] This form of substitute service is a constructive form of notice because the court presumes that the defendant will have knowledge of the suit if the service is delivered to a resident at his dwelling.[152]

In Mississippi, there are two steps for the process server or sheriff to successfully serve the defendant at their usual place of abode: (1) "leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service and (2) by thereafter mailing a copy of the summons and complaint" to that same residence by first class mail.[153] The person who serves the defendant is still a process server that is 18 years or older and not a party or a sheriff appointed by the court upon the plaintiff's request.[154] The detail in the statute that says spouse or other family ensures that the court is focusing on the dwelling or abode to be considered the defendant's "home" or "residence."

Because it is presumed that a resident of suitable age and discretion will notify the interested person of the suit, "direct service upon a person is not necessary when service is made at that person's home with another resident present."[155] Even though the particulars of age and other small details may change from one jurisdiction to another, the general "rule authorizing dwelling house service of process comports with due process." [156] If due diligence is exercised through repeated efforts to serve a person that resides at the individual's dwelling place and these efforts fail, then another method of sending the papers to the individual's dwelling is acceptable, such as service by mail service.[157]

4. Service Via Mail

151. MISS. R. CIV. P. 4(d)(1)(B).
152. Rentz v. Swift Transp. Co., 185 F.R.D. 693, 697 (M.D. Ga. 1998).
153. MISS. R. CIV. P. 4(d)(1)(B).
154. MISS. R. CIV. P. 4(c).
155. Farm Credit Bank v. Stedman, 449 N.W.2d 562, 564 (N.D. 1989).
156. *Id.* (citing 62 AM. JUR. 2D *Process* § 99 (1972)).
157. Estate of Waterman v. Jones, 46 A.D.3d 63, 65 (N.Y. App. Div. 2007).

Mississippi courts allow service of process through registered mail to the defendant's postal address to be a sufficient form of notice.[158] The process server sending "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings" which complies with due process of law.[159]

In Mississippi, service may be served upon a defendant by mail on any class of "individual[s] other than an unmarried infant or a mentally incompetent person" or "a domestic or foreign corporation."[160] These classes of defendants can be served "by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement … and a return envelope, postage prepaid, addressed to the sender."[161] In this jurisdiction, "service by certified mail on a person outside" of Mississippi is also an authorized method of service.[162] The important aspect of service by mail on both in state and out of state defendants is the fact that both require some form of "certified" or "registered mail" to ensure that the defendant was notified before any final judgments were rendered against them.[163]

Different jurisdictions have different laws for substitute service, so it is imperative to check the law of that jurisdiction before deciding what method of service to employ.[164] Some jurisdictions willingly allow this method of service when other methods are ineffective because notice by mail is "inexpensive and efficient."[165] Even though some jurisdictions freely allow this method, other jurisdictions limit this method to only allowing service via mail on out of state defendants.[166] However, when the address or location of a defendant is unknown or service by mail was refused by the defendant, courts will likely resort to a more inefficient means of service, service by publication.

5. Publication Service

158. *Registered Mail*, BLACK'S LAW DICTIONARY (8th ed. 2004).

159. Greene v. Lindsey, 456 U.S. 444, 455 (1982); Noble v. Noble, 502 So. 2d 317, 321 (Miss. 1987) (noting that, "Without doubt, Rule 4(c), Miss.R.Civ.P., prescribes in the alternative several constitutionally permissible methods of effecting service of process . . . .").

160. MISS. R. CIV. P. 4(c)(3).

161. *Id.*

162. *Id.*

163. *Id.*

164. Service of Process, MARKELL & ASSOCS., INC., https://www.markellegal.com/our-services/service-of-process/.

165. Greene v. Lindsey, 456 U.S. 444, 455 (1982).

166. Cent. Insurers of Grenada, Inc. v. Greenwood, 268 So. 3d 493, 502 (Miss. 2018).

Publication is a constructive form of notice that is usually a last resort.[167] Publication service is "where the summons is printed in a newspaper designated by the court and which can be granted upon showing that 'service cannot be made by another prescribed method with due diligence.'"[168] This form of service is constructive because the defendant will be assumed to have knowledge of the proceedings because it will be in public record.[169]

In Mississippi, if it is proven after diligent inquiry that the plaintiff or petitioner does not know the postal address of the defendant, then the clerk "shall promptly prepare and publish a summons to the defendant to appear and defend the suit."[170] The service by publication will appear in the newspaper of the county where the proceedings are pending once a week for three successive weeks.[171] In the event that the county does not have a newspaper, then the notice will be attached to the courthouse door of the county as well as be published in an adjoining county's newspaper.[172] The court assumes this method to be effective whether the defendant reads the notice or not because the information is publicly displayed in the newspaper via publication.[173]

Although service by publication has been accepted as a constitutionally permissible method of service,[174] its constitutionality should be questioned because there are now other methods of service that are substantially more likely to give the defendant notice including social media service. Because this method of service is very unlikely to be seen and costly, some jurisdictions have begun to allow other methods of service to be authorized by the court, such as social media service.[175]

All the traditional methods of service discussed above are methods that are commonly used in other jurisdictions, so Mississippi should follow other progressive jurisdictions by adding a catch-all provision. Under Rule 4 of the Mississippi Rules of Civil Procedure, there is no progressive notice provision, as seen in the New York and New Jersey statutory provisions, or case law that gives the court freedom to authorize an alternative form of service, such as social media service, when the traditional methods are impracticable.[176] This is a provision that

167. MARKELL & ASSOCS., *supra* note 165.
168. GLANNON ET AL, *supra* note 23, at 351.
169. Murray, *supra* note 142.
170. MISS. R. CIV. P. 4(4).
171. *Id.*
172. *Id.*
173. *Publication*, BLACK'S LAW DICTIONARY (8th ed. 2004).
174. Noble v. Noble, 502 So. 2d 317, 321 (Miss. 1987).
175. Eisenberg, *supra* note 18, at 810-813.
176. *Id.*; N.Y. C.P.L.R. 308(5) (McKinney 2016).

Mississippi should consider amending Rule 4 to add because it would increase the likelihood of defendants sufficiently receiving notice, which is the key principle in determining the constitutionality of methods of service.

III. MISSISSIPPI SHOULD ADOPT A SERVICE OF PROCESS RULE THAT WILL ALLOW SERVICE VIA SOCIAL MEDIA

In 2017, 81 percent of the United States population had some form of a social media account.[177] The The increase in the population's use of social media and internet sources opens a whole new opportunity for more efficient service of process. Service of process via social media was first introduced under the flexible notice provision Rule 4(f)(3), which authorizes service "by any means not prohibited by international agreement, as the court orders."[178] Service of process via the internet and social media is one of the most efficient ways to serve an individual in a foreign country depending on the specific facts of the case, time, and money. The language of the statute gives the court the power to allow *any means* of service that it sees as constitutional and reasonable, including social media service.[179]

A form of this catch-all provision giving courts the power to allow "any means"[180] was adopted in some states in the United States.[181] For example, both New York and New Jersey's service rules contain a catch-all provision for difficult cases that their traditional methods of service authorized are impracticable.[182] In the New York notice provision, CPLR 308 (5) authorizes personal service upon an individual to be made "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one [in-hand service], two [service to

177. Clement, *supra* note 6.

178. MISS. R. CIV. P. 4(f)(3).

179. *See*, e.g., FTC v. PCCare247 Inc., No. 12 Civ. 7189, 2013 U.S. Dist. LEXIS 31969, at *3-4 (S.D.N.Y Mar. 7, 2013) (permitting service by email and Facebook); Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs.), 245 B.R. 713 (Bankr. N.D. Ga. 2000) (authorizing service on defendant by fax and email address); Rio Properties, Inc., 284 F.3d at 1016 (permitting service by email); Chanel, Inc. v. acheterchanel.com, 2012 U.S. Dist. LEXIS 115518, 2012 WL 3544844 (S.D. Fla. Aug. 16, 2012) (authorizing service of process by email).

180. *See*, e.g., *PCCare247 Inc.*, 2013 U.S. Dist. LEXIS 31969, at *3-4 (permitting service by email and Facebook); *Broadfoot*, 245 B.R. at 720 (authorizing service on defendant by fax and email address); *Rio Props.*, 284 F.3d at 1016 (permitting service by email)**;** *Chanel, Inc.*, 2012 U.S. Dist. LEXIS 115518 (authorizing service of process by email).

181. N.J. Ct. R. 4:4-4(b)(3); N.Y. C.P.L.R. 308(5) (McKinney 2016).

182. N.J. Ct. R. 4:4-4(b)(3); N.Y. C.P.L.R. 308(5) (McKinney 2016).

dwelling or usual place of abode] and four [nail and mail service] of [CPLR 308] section."[183] This provision gives courts the power to accept any means of service that they find appropriate under the circumstances of the case, including service via social media.

Giving courts this freedom leads to a more efficient way to increase the chance that a defendant will actually receive notice. With the whole purpose behind service of process being to give the defendant adequate notice, Mississippi should follow this trend and expand the rules of service of process to give courts the power to include service through social media for the purpose of increasing the likelihood that a defendant actually receives notice.

A. Proposed Amendment to Mississippi Service of Process Rule

The Mississippi Rules of Civil Procedure were first adopted effective January 1, 1982, which included Rule 4 regarding process and was later amended again in 1982 and 1984.[184] Amendments are "the process of altering or amending a law or document."[185] These alterations are made to improve an existing law when circumstances arise that were not thought of when the law was originally formed. Amendments to the law ensure its ability to remain relevant and flexible to the issues at hand. In order for the courts to be modernized, the Mississippi Supreme Court should request the Mississippi Rules Advisory Committee draft an amendment similar to McKinney's CPLR 308(5) that is specifically tailored to Mississippi's Rule 4.

Courts across the country are "adapting with the times" and taking steps to maximize the effectiveness of notice through the use of social media.[186] If other courts and states are evolving, then Mississippi should do so also in order to give parties in a lawsuit the advantage offered by other courts. The times are changing with the advancements in communication through social media. Seven out of ten adults in American use at least one form of an internet social networking service with

183. Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 711 (Sup. Ct. 2015).

184. Noble v. Noble, 502 So. 2d 317, 319 (Miss. 1987).

185. *Amendment*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2015).

186. Wade v. Furmanite Am., Inc., No. 3:17-CV-00169, 2018 U.S. Dist. LEXIS 75624, at *23 (S.D. Tex. May 4, 2018) (quoting Beltran v. InterExchange, Inc., No. 14–CV–03074–CMA–CBS, 2017 U.S. Dist. LEXIS 205079, at *6 (D. Colo. Apr. 28, 2017) ("The Court agrees that electronic notice through social media platforms is particularly appropriate for classes comprised of largely young, largely transient unnamed plaintiffs, because email addresses and physical addresses may not provide a reliable, durable form of contact.")).

Facebook being the most popular.[187] The recognition of this vastly used method of communication should signal the court's attention and compel them to take advantage of it.

The proposed amendment to Mississippi Rules of Civil Procedure Rule 4 should be a catch-all provision for specific situations that give the court the power to determine what means of service would be the most effective in actually providing the defendant notice of the suit. The desired amendment would add a provision similar to that provided in New York under CPLR 308 (5) which authorizes effective notice "in such manner that the court directs, if service is impracticable under the traditional methods of service listed in the statute,"[188] which gives the court the inherent power to decide what is the more potent or appropriate process under the circumstances.[189] This provision is to give the court authority to allow other means of service when it is impractical to use other alternative methods. The proposed provision is a catch-all because it is the back-up plan for very specific circumstances that an alternative form of service, such as service via social media, is more likely to reach the defendant than traditional means.

The language of the proposed amendment will be crafted from a combination of the flexible notice provisions provided in the New Jersey and New York service rules.[190] The provision would add to the current rule as follows: "(6) by court order. If service is impracticable under sections (c) then: (1) by process server pursuant to section (d), (2) by sheriff pursuant to section (d), (3) by mail, or (6) service by certified mail on person outside state, then any defendant may be served as provided by court order, consistent with due process of law." This provision is proposed to be placed last under section (c) as the catch-all provision. However, service by publication is not included in the list of methods that have to be proved impracticable because the futile means of service by publication should be the last resort when no other means, such as social media service, are available.

With the United States having a high percentage of people on social media, it is likely that an appropriate way to serve a defendant would be social media over publication.[191] The language of "served as provided by court order" in the proposed provision opens the doors to give Mississippi courts the power to authorize service through social media if the court determines under the circumstances that it is a more effective

187. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
188. *Baidoo*, 5 N.Y.S.3d at 711.
189. Bloodgood v. Leatherwood, 25 So. 3d 1047, 1050 (Miss. 2010).
190. N.J. Ct. R. 4:4-4(b)(3); N.Y. C.P.L.R. 308(5) (McKinney 2016).
191. *Packingham*, 137 S. Ct. at 1735.

means to actually give notice. The "court is vested with the inherent power to promulgate procedural rules" under certain circumstances when dealing with a particular class of missing or service evading defendants.[192] This amendment would be to give freedom to the court to decide whether to approve a motion for service by social media only after due diligence has been proved.[193]

This proposed provision is not altering the traditional methods of service offered under the Mississippi Rules of civil Procedure Rule 4. It is simply giving courts another last resort method to choose from in order to ensure justice for missing defendants under certain circumstances. Social media service has already been proven constitutional, when the specific facts of the case allow it, so now Mississippi courts need a provision that authorizes this method of service. With social media service being constitutional and the proposed amendment proven to work in other jurisdictions, the Mississippi courts should incorporate this method into its statute because Mississippi should adapt and evolve to benefit the potential defendants who are desired to be reached.

B. Reasons Mississippi Should Adopt a More Flexible Provision to Include Service of Process Through Social Media

If "the constitutional requirements of service of process are notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,"[194] then why should two forms of notice such as mail and publication be allowed "[when] it will doubtless never be seen?"[195] Since notice, circumstances, and opportunity to be heard are the sole focuses of the constitutional requirement of service of process, how can one say that their efforts to give notice were made in good-faith[196] and reasonably calculated to provide notice if something is doubtful to be seen? If a court has more options than the traditional methods of service that would be more likely to reach the defendant under certain circumstances, such as service via social media, then it should be given

192. *Bloodgood*, 25 So. 3d at 1050 (citing Newell v. State, 308 So.2d 71, 76 (Miss. 1975)).

193. Goetz v. Synthesys Techs., Inc., 415 F.3d 481, 484 (5th Cir. 2005).

194. K.A. v. J.L., 161 A.3d 154, 158 (N.J. Super. Ct. 2016) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (internal quotations omitted)).

195. Noble v. Noble, 502 So. 2d 317, 322 (Miss. 1987).

196. Sanders v. Robertson, 954 So. 2d 493, 496 (Miss. App. 2007) ("Sanders next argues that he made a good faith effort to serve Robertson but could not do so because he could not locate her.").

the authority to make that determination and allow the method most likely to give a potential defendant the opportunity to defend himself.

Even though "a probably futile means of notification is all that the situation permits" to be considered constitutional notice when a person's location is unknown, the courts should still use the method that is most likely to reach the defendant if one is available.[197] For example, in the United States Supreme Court, the court denied service by publication because the defendant's address was known making service by mail an available method.[198] In *Schroeder v. City of New York*, the court asserted that if there was a better method of service available, then it should trump the alternative.[199] If service by mail trumps publication, then surely service by e-mail should also. Service by publication is only constitutionally acceptable "because it [i]s no more likely to fail to give actual notice than any other method that the legislature could possibly prescribe," especially when dealing with missing defendants.[200] This is no longer the case with advances in technology because now there is social media service that legislature could prescribe that would trump publication.

If there are other means available that would more likely reach the potential defendant than other traditional means, then that alternative method, such as social media service, should be implemented in order to comply with due process. "The determination of due process requires the balancing of 'the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement' against 'the individual interest sought to be protected by the Fourteenth Amendment.'"[201] Amending the rules to add another back-up plan that gives courts the freedom to approve alternative methods of service based on the circumstances of the case will only improve the defendant's likelihood of receiving notice while protecting the defendant's right to be heard under the Fourteenth Amendment. Addition of a flexible notice provision would protect a defendant's due process rights because the court would be allowing all efforts to get notice to a defendant, which would result in a constitutional, good faith effort.

Mississippi courts should never lose focus of the purpose of notice, which is to give the defendant the opportunity to be heard, and service of process is used to accomplish notice. With the main focus being

197. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317 (1950).

198. Greenbaum, *supra* note 31.

199. Schroeder v. City of New York, 371 U.S. 208, 213 (1962).

200. Eisenberg, *supra* note 18, at 782.

201. K.A. v. J.L., 161 A.3d 154, 158 (N.J. Super. Ct. 2016) (citing *Mullane*, 339 U.S. at 314-15).

to give the defendant the opportunity to be heard, the court should have the freedom to decide what method is most likely to accomplish this standard goal. If means have to be that of attempting to actually inform the defendant, then a court allowing service by publication rather than another more pragmatic means, such as social media service, would not be truly desirous of actually informing the defendant.[202] One actually desirous of informing the defendant would have chosen a different method to increase the likelihood of actually informing the defendant.

The court should be able to choose from all its possible resources, not just the traditional, old fashioned methods, so an amendment is necessary to expand the courts' options. For example, if an individual has a set of tools and none of the tools in their toolbox would effectively fix a certain problem, they could use duck tap (publication) even though this quick fix is not the most efficient method. If there was a tool that had evolved and would help accomplish the simple goal of giving notice to a missing defendant, then why would the individual not add the tool to their toolbox. Similarly, Mississippi should amend Rule 4 to add a broad notice provision, so courts have all the tools to ensure that a defendant gets a sufficient, good-faith effort in attempting to notify them of the proceedings.

Aside from being more constitutional by choosing the most adequate method from all possible resources, another benefit social media has to offer includes "relatively unlimited, low-cost capacity for communications of all kind."[203] Courts should utilize this benefit. One of the most common complaints with any interaction with the judicial system is the expenses that come alongside it. As shown in *Joe Hand Promotions, Inc. v. Shepard*, the plaintiff complained that he '"exhausted all of standard means by which [he] [could] serve the defendants . . . and [has] incurred great expense in doing so.'"[204]

Publication and paying for postal services to serve a defendant can become costly when it takes "multiple attempts" to serve someone in order to show that the plaintiff did their due diligence in attempting to notify the defendant.[205] For example, in *Mullane*, notice by mail was alleged to be more effective in getting notice to defendants than publication because mail was recognized as an efficient and inexpensive means of communication that did not put an unnecessary burden on

202. *Mullane*, 339 U.S. at 315.

203. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

204. Joe Hand Promotions, Inc. v. Shepard, No. 4:12cv1728 SNLJ, 2013 U.S. Dist. LEXIS 113578, at *3 (E.D. Mo. Aug. 12, 2013).

205. Goetz v. Synthesys Techs., Inc., 415 F.3d 481, 484 (5th Cir. 2005).

plaintiffs.[206] With social media being an even more efficient and inexpensive means of communication than mail, surely it should be more effective than publication. If there is another method available that is speedier, less costly, and possibly more effective in providing the defendant with notice, then the court should take this method into account when determining what method is reasonably calculated to give notice.

Another reason Mississippi should amend Rule 4 is that, if courts are allowing social media into courts as evidence and e-signatures to form contracts, then why not evolve to allow service of process through social media as well. If a "[c]ourt concludes [a plaintiff] may employ its proposed electronic signature method for execution of consent forms," then why vary from this general practice of allowing electronic and internet-based methods, evidence, and contracts into court.[207] If Mississippi courts are willing to determine the outcome of a case based on evidence from social media, as seen in *Smith v. State*, then a plaintiff should be allowed to simply serve a defendant through the same means.[208] With the times changing and social media becoming more present in proceedings, it is time to amend Rule 4 to adapt and evolve for the benefit of potential defendants as well as the efficiency to the judicial system.

Mississippi not adopting a more flexible provision that would give courts the power to authorize service of process through social media only puts defendants at a disadvantage. If all we care about is giving adequate notice to defendants so that they have the opportunity to be heard, then Mississippi should include service of process though social media to increase the chances of defendants actually receiving notice.[209] Mississippi needs to adapt to the advances in communication for the benefit of potential defendants.

C. The Negatives of Service of Process Through Social Media

One major drawback courts consider regarding social media service is the uncertainty that the person on the other end of the internet is actually the person the plaintiff desires to serve. This central drawback is the main reason social media service has been held to be unconstitutional in some cases. As seen in *Fortunato v. Chase Bank USA*, the court's

206. *Mullane*, 339 U.S. at 315.

207. Wade v. Furmanite Am., Inc., No. 3:17-CV-00169, 2018 U.S. Dist. LEXIS 75624, at *24 (S.D. Tex. May 4, 2018) (citing Dyson v. Stuart Petroleum Testers, Inc., 308 F.R.D. 510, 518 (W.D. Tex. 2015)); Aguirre v. Tastee Kreme #2, Inc., No. CV H–16–2611, 2017 U.S. Dist, LEXIS 83327, at *8 (S.D. Tex. May 31, 2017).

208. Smith v. State, 136 So. 3d 424 (Miss. 2014).

209. *Mullane*, 339 U.S. at 314 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

concern that "anyone can make a Facebook profile using real, fake, or incomplete information" prevented the court from being able to confirm the authenticity of the defendant's social media account.[210]

It is true that people commonly steal other individuals' identities over the internet, and plaintiffs can never be 100 percent sure that they are actually communicating with the defendant they desire to give notice to. The inability to confirm the authenticity of the account marks the method of service unconstitutional because the court cannot reasonably find that notice will reach the defendant when they do not reasonably trust that the account belongs to the desired defendant. However, in some cases, plaintiffs have set forth enough facts that provided courts with a degree of certainty in regard to the authenticity of the social media account, rendering it a constitutional method. Even though the "concerns over authentication arise because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account,"[211] there are ways to check Internet Protocol addresses[212] as well as checking the activity on the social media accounts to make sure it is the person that the plaintiff actually desires to reach.

Mississippi has a standard to prove the authenticity of Facebook messages to permit them to be entered into evidence. In Mississippi, such evidence is sufficiently authenticated when:

> ". . . the sender admits authorship, the purported sender is seen composing the communication, business records of an internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have access to the computer or cell phone, the communication contains information that only the purported sender could be expected to know, the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or other circumstances peculiar to the

210. *See* Fortunato v. Chase Bank USA, No. 11 Civ. 6608 (JFK), 2012 U.S. Dist. LEXIS 80594, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (citing Smith v. State, 136 So. 3d 424 (Miss. 2014)).

211. *Smith*, 136 So. 3d at 432.

212. *IP Address*, TECHTERMS, https://techterms.com/definition/ip_address (An Internet Protocol address, "or simply an 'IP,' is a unique address that identifies a device on the Internet or a local network.").

> particular case may suffice to establish a prima facie showing of authenticity."[213]

This rule was provided in *Smith* where the defendant argued that the court erred in admitting several Facebook messages into evidence because it was not proven that the defendant controlled the Facebook account.[214] Even though there was not enough evidence set forth in this particular case, there are cases that have, and will, set forth evidence substantial enough to prove the authentication of the defendant's ownership of the account.[215] For example, enough set of facts were set forth in *Baidoo*[216] and *K.A. v. J.L.*[217] that would have met the requirements set out in Mississippi's authenticity rule.

The standard provided in Smith, proves that Mississippi is accepting of social media evidence when there is enough evidence to prove the defendant is the true owner of the social media account.[218] The same requirements to prove authenticity for social media evidence can be used to prove the identity of a defendant for social media service. If courts are willing to determine the outcome of cases with the high risk of finality based on social media evidence, then courts should allow social media service to simply kick the lawsuit off.

Though there will always be some uncertainty, the uncertainty of not reaching the desired person via social media is similar to the uncertainty of service by publication. With service of process by publication, the uncertainty of actually getting a defendant notice is just as great, if not greater. The uncertainty of not reaching the desired person is an issue that is present in all alternative methods that are not personal service. This uncertainty is not enough to not allow service via social media.

Another drawback for many courts, as well as Mississippi courts, is that allowing social media service is asking courts to "venture into

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213. *Smith*, 136 So. 3d at 433.

214. *Id.*

215. *Id.*

216. Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 714 (Sup. Ct. 2015).The court found the copies of communication exchanged between the plaintiff and defendant over Facebook messages, along with verification of the defendant's photos, to be enough to persuade the court that the account belonged to the defendant.

217. K.A. v. J.L., 161 A.3d 154, 159 (N.J. Super. Ct. 2016). The court did not require as much evidence proving the authenticity of the Facebook account because it was the exact account the defendant employed to contact the adopted son and gave rise to the action for an injunction.

218. *Smith*, 136 So. 3d at 433.

uncharted waters without the guiding light of clear judicial precedent."[219] Many jurisdictions are uneasy about stepping out of their comfort zones and permitting nontraditional methods of service. However, the State of New York has always been a trendsetter, and New York's acceptance of a flexible provision that permits social media service is a trend that all jurisdictions, including Mississippi, should follow. Just because there is no judicial precedent guiding the decisions to allow social media service does not mean it is wrong. If everything new or different was considered to be wrong, then the courts would never grow and evolve to benefit the efficiency of the judicial system.

D. The Expansion to Include Service Through Social Media Carries More Positive Weight Than Negative

The benefits of social media service to defendants outweighs the potential drawbacks. The main focus of service of process is to give defendants notice of an action, so they can defend themselves. Service of process through social media can be more effective than other means of service in certain situations, so courts should be given the freedom to choose means that are more effective, such as service via social media.

The circumstances and facts of each case trigger what method of service is practicable for that particular situation. For example, if the circumstances show that the defendant desired to be notified can be located or the address of the defendant is known, then service in-hand, by dwelling or usual place of abode, or by mail are all permitted.[220] However, when the circumstances include a defendant that is a nonresident of the state, cannot be found after diligent inquiry, or whose post office address is unknown after diligent inquiry, then the circumstances would permit service by publication.[221] If the circumstances show that the defendant is located outside of Mississippi, then the plaintiff can choose service by certified mail for convenience, rather than taxing themselves with other more invasive methods.[222] The circumstances of the case are the basis for what makes the court find a method of service sufficient. Advances in technology have created circumstances that would make social media service the more pragmatic method, such as situations where the defendant is evading service, cannot be located, or the lawsuit was initiated over the internet or social media. Because of advances in communication creating circumstances that make social media service the

219. *Baidoo*, 5 N.Y.S.3d at 713.
220. MISS. R. CIV. P. RULE 4(c)(1-3).
221. MISS. R. CIV. P. RULE 4(c)(4).
222. MISS. R. CIV. P. RULE 4(c)(5).

more efficient method, the Mississippi Supreme Court should adapt and request an amendment to add a more flexible provision to authorize social media service to give relief to these specific situations.

Service via social media is more efficient because plaintiffs do not have to waste time and money searching for a defendant, paying a process server to make multiple trips to a residence, or paying for publication that is costly. The efficiency of being able to find defendants faster on the internet and social media is a benefit that would make service of process more efficient and less costly. These benefits outweigh potential uncertainty that one might have with regards to the right person being the true social media account holder.

VI. CONCLUSION

For notice to be constitutionally sufficient, the method of service must be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action."[223] With emphasis on "reasonably calculated," it is questionable how courts consider service of process though publication or certified mail when a defendant's location is unknown to be "reasonably calculated" when there is a whole other universe of communication being underutilized. The times have changed with eight out of ten people on Facebook and 81% on some form of social media. The technological advances have opened up a new set of cheaper and faster sources of communication, and courts should take advantage of this.

All the traditional methods of service authorized under Mississippi's Rule 4 are traditional because they are commonly authorized in other jurisdictions, so if other jurisdictions are expanding their methods of service, then Mississippi courts should follow to evolve and be more efficient. The Mississippi Supreme Court should follow other progressive jurisdictions, such as New York and New Jersey, by adding a flexible notice provision to Rule 4. Mississippi should adopt this flexible notice provision to give its courts the power to allow service of process through social media under certain circumstances, so a court may fairly determine what is *reasonably calculated* from *all* the available resources. Conforming to the use of technology and social media as an alternative method of service will only improve the likelihood that the defendant receives notice and, therefore, better comply with the constitutional requirements of notice.

223. Greene v. Lindsey, 456 U.S. 444, 455 (1982).